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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1974

No. 73-1954

ALPHA DISTRIBUTING COMPANY OF CALIFORNIA, INC., also doing business under the name and style of Alpha Distributing Company, Inc.,
Petitioner,

vs.

JACK DANIEL DISTILLERY, LEM MOTLOW PROP., INC., a corporation; BROWN-FORMAN DISTILLERS CORPORATION, et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit

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PETITION FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit

Pursuant to Rule 19, Supreme Court Rules, petitioner, Alpha Distributing Company of California, respectfully prays that a writ of certiorari issue to the United States Court of Appeals for the Ninth Circuit to review its judgment entered on April 12, 1974 (appendix 3), proposing to affirm a judgment

of the District Court for the Northern District of California (appendix 5) proposing to dismiss petitioner's action in a case removed from the Superior Court of the State of California on December 23, 1960.

PRELIMINARY STATEMENT AND REFERENCES

The proceeding before the Court of Appeals was an appeal from a judgment of the District Court in purported conformance to the mandate of the Court of Appeals in three earlier appeals in the action (appendix 4, 454 F.2d 442), remanding the action to the District Court for additional findings upon the antitrust issues and questions reserved for decision.

This petition brings on for review the judgment of the Court of Appeals as related to the underlying judgments of the District Court.

References herein to the judgments and opinions below are as follows: to the judgment and opinion of the Court of Appeals entered January 6, 1972, appendix 4 (454 F.2d 442), the first opinion, and (2) the judgment entered on April 12, 1974, appendix 2, the second opinion, and to the judgment of the District Court entered on March 24, 1969, appendix 5, the first judgment, and to the judgment entered on June 23, 1972, appendix 6, the second judgment. Other references and abbreviations are as indicated in the first opinion (appendix 4, at page 7) and, unless otherwise indicated, emphasis, insertions and omissions in quotations herein are supplied by counsel.

At relevant times, Alpha was a wholesale distributor of alcoholic beverages in a portion of California licensed and engaged in its business as an independent contractor purchasing such merchandise for resale to licensed retailers located in its area of operations. At such times, Jack Daniel was a distiller of whiskeys in the State of Tennessee and in 1950 entered into an agreement with Alpha for the sale of its whiskeys to Alpha for resale in Alpha's area of operation to be purchased and imported into California by Alpha. Jack Daniel had no license and was not qualified to do business in California.

Jack Daniel's Tennessee whiskey constituted a separate category of distilled spirits as officially classified (*Jack Daniel Distillery, etc. v. Hoffman Distilling Co.,* 190 F. Supp. 841) and was a unique product unavailable from any other source and of which Jack Daniel enjoyed a monopoly (*Jack Daniel Distillery, etc. v. United States,* 379 F.2d 469).

Alpha's sales of Jack Daniel's whiskeys steadily increased and it was stipulated that "Alpha was a good distributor" of such merchandise. Jack Daniel's business also prospered to the extent it could not supply the demand for its whiskeys and, in 1956, Jack Daniel placed Alpha upon an "allocation" purchase scheme restricting resale by Alpha of supplies made available by Jack Daniel to Alpha's 3,500 then established customers for Jack Daniel's whiskeys and hired Parrott & Co., a competitor of Alpha, to police Alpha's conformance to Jack Daniel's allocation scheme, territorial restrictions and prices of resale by

Alpha of Jack Daniel's whiskeys purchased and imported by Alpha.

Jack Daniel's allocation scheme and its enforcement continued until Jack Daniel refused to sell any further of its whiskeys to Alpha on December 31, 1960, when the distribution of Jack Daniel's whiskeys was switched to competitors of Alpha, Rathjen Bros. and Rathjen Bros. of Oakland. Jack Daniel then hired Parrott & Co. to "aid and abet" Rathjen to carry on Jack Daniel's allocation scheme in supplying Alpha's then established customers for Jack Daniel's whiskeys and transferring their business to Rathjen forcing Alpha to discontinue its business in 1961.

Brown-Forman was a distiller of whiskeys in the State of Kentucky and elsewhere, a competitor of Jack Daniel and other distillers, and dealt with Rathjen upon an exclusive basis.

In August of 1956, Brown-Forman acquired, through a newly created and wholly owned subsidiary, all the corporate shares of Jack Daniel (*Jack Daniel Distillery, etc. v. United States,* supra, 379 F.2d 469).

During 1958, Brown-Forman proposed to deal with Alpha in its own distilled spirits products on condition that Alpha exclude from its existing business of dealings with a competing distiller, Schenley Industries, Inc., and its subsidiaries, which proposal Alpha declined.

Jack Daniel's termination of its contract with Alpha and refusal to further deal with Alpha in its whiskeys was directed by Brown-Forman at the insistence of Rathjen's executives and it was stipulated in the trial

of the action that "Brown-Forman was . . . exercising a substantial asset that it had acquired" for "something like $18,000,000."[1]

In its first judgment, the District Court made findings in Alpha's favor upon its contract claim, awarded Alpha damages in the amount of $205,000 on this claim and awarded costs. The first judgment denied Alpha relief upon its tort and antitrust claims (appendix 6, at pages 34 and 35).

The Court of Appeal, in its first opinion, reversed the first judgment (appendix 6) on Alpha's contract claim, affirmed it as to denial of relief on Alpha's tort claim and remanded the cause to the District Court for further findings upon the issues of Alpha's antitrust claims and the making of a further judgment (appendix 4, at pages 28-29, 454 F.2d 442).

Upon remand, the only supplemental findings (clerk's transcript of record 2762-2773) were to the effect that respondents had acted in terminating Jack Daniel's contract and refusing to further deal with Alpha, upon "the conclusion that this course was in the best financial interest[2] of Jack Daniel" and of

[1]References and quotation of the record as summarized here are detailed in Alpha's brief as appellee in the first appeal at pages 9-29 and are not repeated at this time since the Court of Appeals directed that briefs and record on the first appeal be used in the second appeal (appendix 4 at page 29).

[2]Compare *Otter Tail Power Co. v. United States*, 410 U.S. 366, 380, 35 L.Ed.2d 359, 369, 93 S. Ct. 1022, in relevant part:

". . . The argument is a familiar one. It was made in United States v. Arnold Schwinn & Co., 388 U.S. 365, 18 L.Ed. 1249, 87 S.Ct. 1856, a civil suit under §1 of the Sherman Act dealing with a restrictive distribution program and practices of a bicycle manufacturer. We said: 'The promotion of self-interest alone does not invoke the rule of reason to immunize otherwise illegal conduct.' Id., at 375, 18 L.Ed.2d 1249."

Brown-Forman (Clerk's transcript of record, page 2770 at lines 19-29).

STATEMENT CONFORMING TO RULE 23

1. Conforming to Rule 23, petitioner sets forth the following summary.

OPINIONS BELOW

The opinions of the Court of Appeals are (1) the first opinion, appendix 4, reported at 454 F.2d 442, and (2) the second opinion, appendix 3, not reported at this date. The opinions of the District Court are not reported.

JURISDICTION

Jurisdiction of the Court is invoked under section 1254, Title 28, United States Code, subpart 1 and Rule 19, Supreme Court Rules, upon the grounds that the Court of Appeals has rendered a decision (i) deciding important questions in a way in conflict with applicable state law, (ii) deciding questions in conflict with other Courts of Appeals on the same matters, (iii) deciding federal questions in a way in conflict with decisions of the Court and (iv) so far departing from the accepted and usual course of proceedings and so far sanctioning such a departure by the District Court as to call for an exercise of the Court's power of supervision.

The jurisdiction of the District Court was invoked under Title 28 U.S.C., sections 1332 and 1441, upon diversity of citizenship of plaintiff (California) and

respective appearing defendants (Tennessee and Delaware). In respect to plaintiff's fourth cause of action, as added after removal of the state action to the District Court, jurisdiction was invoked under Title 15 U.S.C. "section 15 and Title 28 U.S.C. section 1337."

(i) The judgment of the Court of Appeals was dated and entered on April 12, 1974;

(ii) An order denying a rehearing (appendix 2) was dated and entered on May 31, 1974, and the Court of Appeals made its order dated June 12, 1974, and entered June 14, 1974 (appendix 1) staying its mandate to permit filing of a petition for certiorari until June 30, 1974; and

(iii) Petitioner believes that subpart 1 of section 1254 of Title 28, United States Code, confers jurisdiction upon the Court.

QUESTIONS PRESENTED

The questions presented for review are whether the judgment of the Court of Appeals is materially and prejudicially erroneous (i) in independently resolving factual issues to the contrary of clear and fully supported findings of the District Court, declining to follow the integrated rules of state decision applicable to the findings of the District Court and supported by the record below and reversing Alpha's valid judgment on the contract issues in a removed case; (ii) in declining to review Alpha's tort claim in accordance with the integrated rules of decision of the state upon admissions and uncontradicted evidence invoking such rules of decision; and

(iii) in declining to review inadequate, unresponsive and inadmissible findings of the District Court as related to Alpha's state antitrust claims as fully supported by the admissions and uncontradicted evidence received in trial; and in declining to review, as related to federal antitrust laws and commerce among the states, such inadequate, unresponsive and inadmissible findings in the light of the admissions and uncontradicted evidence received in the trial of the action.

STATUTES INVOLVED

The state statutes involved in this case include the following:

(i) As related to the contract issues, the California Civil Code provides as follows:

"§ 1549. A contract is an agreement to do or not to do a certain thing."

"§1584. Performance of the conditions of a proposal, or the acceptance of the consideration offered with a proposal, is an acceptance of the proposal."

"§ 1589. A voluntary acceptance of the benefit of a transaction is equivalent to a consent to all the obligations arising from it, so far as the facts are known, or ought to be known, to the person accepting."

"§ 1620. An express contract is one, the terms of which are stated in words."

"§ 1622. All contracts may be oral, except such as are specially required by statute to be in writing."

"§ 3300. For the breach of an obligation arising from contract, the measure of damages, except where otherwise expressly provided by this code, is the amount which will compensate the party aggrieved for all the detriment proximately caused thereby, or which, in the ordinary course of things, would be likely to result therefrom."

The California Commercial Code provides as follows:

"§ 1203. Every contract or duty within this code imposes an obligation of good faith in its performance or enforcement. (Stats.1963, c. 819, § 1203.)"

"§ 2306. Output, Requirements and Exclusive Dealings. (1) A term which measures the quantity by the output of the seller or the requirements of the buyer means such actual output or that no quantity unreasonably disproportionate to any stated estimate or in the absence of a stated estimate to any normal or otherwise comparable prior output or requirements may be tendered or demanded.

(2) A lawful agreement by either the seller or the buyer for exclusive dealing in the kind of goods concerned imposes unless otherwise agreed an obligation by the seller to use best efforts to supply the goods and by the buyer to use best efforts to promote their sale. (Stats.1963, c. 819, § 2309.)"

"§ 2716. (1) Specific performance may be decreed where the goods are unique or in other proper circumstances.

(2) The decree for specific performance may include such terms and conditions as to payment

of the price, damages, or other relief as the court may deem just.

(3) The buyer has a right of replevin for goods identified to the contract if after reasonable effort he is unable to effect cover for such goods or the circumstances reasonably indicate that such effort will be unavailing or if the goods have been shipped under reservation and satisfaction of the security interest in them has been made or tendered. (Stats.1963, c. 819, § 2716.)"

(ii) As related to the state generated antitrust issues, the Business and Professions Code of California, sections 16700 through 16758 prohibit combinations and acts in restraint of trade and relevant provisions (sections 16720, 16727, 16750 and 16757) are set forth in appendix 7) hereto; and

(iii) As related to Federal Antitrust issues, sections 1 and 2 of the Sherman Act and sections 3, 4 and 7 of the Clayton Act as reenacted in Title 15 of the United States Code, sections 1, 2, 14, 15 and 18 are set forth in appendix 8 hereto.

STATEMENT OF THE CASE

A concise statement of the case and of the facts material to the consideration of the questions presented is set forth in relation to the respective questions stated in part 1, hereof.

1. The Contract Questions.

The proof of Alpha's contract claim was adequate under California statute and common law and was

lawfully resolved by the District Court in its findings of fact and conclusions of law on the issues of Jack Daniel's liability for breach of its agreement with Alpha (clerk's transcript, pages 381-397) and in its findings upon the issues of damages (clerk's transcript, pages 431-436) as decreed in the first judgment of the District Court (appendix 6) in response to the evidence and the admissions and stipulations of Alpha and Jack Daniel and in conformance to California substantive law and applicable rules of evidence.

The Court of Appeals in its first opinion (appendix 4) erroneously and prejudicially resolved the evidence and the record, independently and in a manner clearly contrary to valid and supported findings of fact of the District Court and also contrary to the evidence, admissions and stipulations of Alpha and Jack Daniel.

Specifically, the Court of Appeals (appendix 4, pages 14 and 15) disregarded the delineation of the contract issues as submitted by Jack Daniel and on which the action was tried as to this respondent's defense to Alpha's contract claim (there was no pretrial conference order) and the fact that Jack Daniel did not advance "a reasonable time contract" but a so-called "at will contract", "outside the Burgermeister case."

Alpha petitioned for a rehearing which was denied, and set forth a summary and quotation of Jack Daniel's submission of the contract issues in an appen-

dix thereto, which is reproduced as appendix 9 hereto in lieu of restatement.

Further and specifically, the Court of Appeals incorrectly resolved the evidence, in all events: for example, it disregarded specific evidence in finding that there was no express undertaking by Alpha to "exercise its best efforts" (appendix 4 at page 15) particularly Alpha's letter dated September 7, 1950, confirming the contract negotiations (Alpha's exhibit 8) providing, in relevant part, as follows:

> ". . . We appreciate the consideration given us and you may rest assured that if you decide favorably toward us, *we will do everything to propagate the brand to the best of our ability in this market.*"

The Court of Appeals misconceived and misstated the contract questions, declined to follow California rules of decision specifically applicable to the contract issues as specifically reserved by the parties (appendix 9) and adopted the expressly excluded "reasonable time" issue as excluded by the submissions of both of these parties and by the findings and conclusions of the District Court.

2. The Tort Questions.

The Court of Appeals declined to consider the questions presented by the uncontradicted proof of the conspiratorial, knowing and active interference by respondents with Alpha's property and business in diverting Alpha's business and good will with its

established customers to Rathjen as enforced and carried out by respondents, Rathjen and Parrott & Co.

3. The Antitrust Questions.

The Court of Appeals, in its second judgment (appendix 3) declined to consider the antitrust questions presented either as related to (a) the state generated, or (b) the federal, antitrust questions presented by the admissions and evidence in trial and declined to review the District Court's failure to make findings upon any of the issues of fact expressly mandated by the first opinion for supplemental findings (appendix 4 at pages 26-29) and proposes to resolve the antitrust questions without, concededly necessary, findings of fact.

These considerations clearly appear from the detailed directions in the remand in the first opinion, the unresponsive supplemental "findings" of the District Court upon the remanded issues and the absence of consideration of the lack of support for the unresponsive supplemental "findings" in the second opinion (appendix 3). Alpha petitioned for a rehearing, which was denied (appendix 2).

The Court of Appeals further declined to apply the law and public policy of California, or of the United States, to the admitted and established facts supportive of the issues reserved by Alpha's respective antitrust claims.

ARGUMENT

ARGUMENT AMPLIFYING THE REASONS RELIED UPON FOR THE ISSUANCE OF THE WRIT IS RESPECTFULLY SUBMITTED IN RELATION TO ALPHA'S REQUEST FOR FURTHER REVIEW OF THE RESPECTIVE JUDGMENTS OF THE COURT OF APPEALS AND UNDERLYING JUDGMENTS OF THE DISTRICT COURT.

1. As Related to Alpha's Contract Claim.

Alpha's contract claim is controlled by California statute and common law as declared by California courts and the happenstance that the District Court and the Court of Appeals became surrogates for those courts by reason Jack Daniel's residence in Tennessee did not invoke a completely independent system of jurisprudence by any means.

A contract is constitutionally protected property, as is a claim for its breach and, certainly, a lawful and supported judgment enforcing such a claim is equally protected by fundamental constitutional principle.

It is, similarly, a matter of constitutional limitation that the federal courts are required to follow state law in litigation upon state generated claims in removed cases (*Lehman Bros. v. Schein,* ..... U.S. ....., 40 L.ed.2d 215, 220 (and cases cited)) and Jack Daniel's breaches of its contract with Alpha were not immunized by the removal of this action.

Jack Daniel expressly and specifically disclaimed any issue of "a reasonable time contract" (see *J. C. Millett Co. v. Park & Tilford Distillers Corp.,* 123 F.Supp. 484, 489 Nor. Dist. Cal. cited with approval by the California Supreme Court in *San Francisco*

Brewing Corp. v. Bowman, infra, 52 C.2d 607, 613, 614, 615, 616, 617) as an issue or question reserved for trial at the outset of the trial of this action (appendix 9, page 44) and represented "that the case will boil down to . . . not only *what the witnesses say* they said but *the way they conducted themselves* as to what was orally agreed upon and *what the parties contemplated*" whereas Alpha specifically advanced its position that "a Bowman type contract" was to be proved and found (Appendix 9).

The judge presiding in the trial was the Chief Judge of the District Court of many years experience as a judge and practitioner in the federal and California courts, not an " 'outsider' lacking the common exposure to local law which comes from sitting in the jurisdiction" (*Lehman,* supra, 40 L.ed.2d 215, 220) and made supported, adequate and express findings on the issues respectively advanced by Alpha and Jack Daniel (clerk's transcript, 3:19-21:6).

Notwithstanding, the Court of Appeals in its first judgment[3] (appendix 4 at page 18) erroneously sought to reverse upon the entirely extraneous and expressly declined and withdrawn issue and question of "a reasonable time contract" and sought to independently resolve the evidence and admissions of these parties to fit such extraneous theory of "a reasonable time contract".

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[3]The second opinion does not advert to the earlier rulings made by other members of the Court of Appeals in the first opinion.

Specifically, it is the California rule of decision in the precise context of the questions herein presented—

> "Substantively, the evidence established that plaintiff's contract could not be terminated by the defendant without cause. (*Zinn v. Ex-Cell-O Corp., supra.*) *Procedurally, the plaintiff withdrew any reasonable time issue* from the determination of the court and the *defendant pleaded nothing* with reference to duration *other than that it was an 'at will' agreement.* . . . An express *'as long as performed' contract is not an implied 'reasonable time' contract.* (See Civ. Code §§1619, 1620, 1621.)"
>
> (*Mangini v. Wolfschmidt, Ltd.*, 192 C.A.2d 64, 74-75, 13 Cal.Rptr. 503)

Herein the District Court in its special findings on Alpha's contract claim found that "the contract between plaintiff and defendant Daniel, as modified and in effect on October 31, 1960, and on December 31, 1960, was in the terms and effect alleged by plaintiff" (clerk's transcript, 353:3-6) which allegations included the statement, namely: "plaintiff and Daniel further undertook and agreed that plaintiff should remain and continue as Daniel's exclusive distributor in plaintiff's exclusive territory and performance of said contract on its part should and would continue *as long as plaintiff performed its undertakings thereunder,* maintained said inventories, services and facilities and used its best efforts to promote and solicit the sale and resale of Daniel's said products in plaintiff's exclusive territory . . ." (clerk's transcript 9:28-10:10.)

The California rule of decision is clear. In the first *Bowman decision* (52 C.2d 607, 613, 614, 615, 341 P.2d 1) The Supreme Court declared that

> ". . . *There is no merit in plaintiff's contention that such contract was neither alleged or proved* . . . ' . . . it is also apparent from defendant's testimony that by their conduct the parties continued under the same general plan and agreement from that time forth and through the varying changes . . . to and including the last four years . . .
>
> * * *
>
> *The jury might properly have found such a contract, containing no provision for termination.* [Williston] also further states (at p. 2852): . . . A similar result should be reached though the dealer is a buyer-distributor rather than a technical agent, *where in addition* to undertaking to pay for the manufacturer's products as ordered, *he promises to establish or maintain adequate sales and demonstration facilities* . . . for handling said products.'
>
> * * *
>
> "But it does not result that as soon as a profit has been made the contract becomes terminable at will."

In the second *Bowman* decision (227 C.A.2d 274, 280; 38 Cal. Rptr. 597, hearing by Supreme Court denied) the Court further delineated the rule and its application as follows:

> ". . . But this is a rule applicable to contracts wholly executory and, as stated by Professor Corbin (*op. cit.*, p. 76): 'In every case of this kind, however, the agreement should be scrutinized

carefully to see whether the promisor *did not give some consideration that was not affected by his power to cancel,* and also whether there has not been a part performance that makes up for the defects of the consideration.' (Italics supplied.)

Assuming, without deciding, that Bowman had not *promised* to exert his best efforts to sell Burgermeister's beer or to take care of the territory, he had in fact done so for a period of 19 years, had provided a fleet of trucks, painting them with Burgermeister advertising, had contributed to the brewery's advertising fund, had built warehouse facilities and had enlarged his inventory beyond his winter needs, etc. Such a contract is not merely an executory promise for a promise. Professor Williston describes such a contract as 'an exclusive option by which the manufacturer promises to deal through no others within the defined territory . . . so long as the dealer desires to handle his products. . . . If there is sufficient consideration, this option is clearly a contract and is so held.' (4 Williston on Contracts (rev. ed.) § 1027a, p. 2850.) There was sufficient consideration given here." (Emphasis by the Court.)

A respected commentator on California law, Mr. B. E. Witkin, has classified the Bowman ruling (Summary of California Law, 8th ed. pp. 166-167, Contracts, ¶176, Effect of Part Performance) as a rule applicable in this case, stating:

". . . But the rule invoked, said the court, *applies only to wholly executory contracts, not to* one in which the promisor gives some *non-cancellable consideration or renders some part performance* . . . [quoting that opinion as last above quoted]"

See, also, the California cases analyzed in the definitive annotation in 19 ALR 3d 196-395, Termination by Principal of Distributorship Contract Containing No Express Provision for Termination, particularly at pages 234 (footnote 13), 240 (federal cases applying California law), 242, 250, 252, 256, 282, 329 and 359-371.

The Court of Appeals further and erroneously disregarded specific evidence, including Alpha's express undertaking to "do everything to propagate the brand to the best of our ability" (Alpha's exhibit 8), Alpha's "promises to allocate, to keep records of the amount . . . make allocation records available to Daniel . . . to refrain from the purchase of charcoal filtered whiskey during the period of allocation and . . . during the continuation of the contract" (appendix 9)—all irrevocably performed, all considered and lawfully resolved by the District Court.

The misconception of the Court of Appeals of the issues and its disregard of Alpha's evidence and the conscious and express concessions of Jack Daniel constitute the exclusive foundation for its conclusion—that the "Bowman type contract", as proved and found by the District Court, was incorrect in law under the "true California rule".

These obvious miscarriages further demonstrate the fallacy of inadmissible attempts of a reviewing court to recast the facts as found by the trial court when constitutionally restricted to review as to "questions of law alone".

The rulings in the only case cited by the Court of Appeal to support its misconception of California law (*International Aerial Tramway Corp. v. Konrad Doppelmayr & Sohn,* 70 C.2d 400, 74 Cal.Rptr. 908, 450 P.2d 284) was and remains irrelevant to the subject matter of Alpha's contract claims for the following reasons:

1. The case cited did not involve evidence or findings but only jurisdiction and dismissal on a demurrer sustained to a pleading and the California Court reversed and *remanded to permit the allegation of terms of duration* (pages 403, 408 and 409) herein alleged, proved and found, i.e.: as long as Alpha "did everything to propagate the brand to the best of our ability" (vis-a-vis "best efforts," as in *Bowman* and section 2306 of the Commercial Code)—stating its ruling and rationale (at page 408), namely:

> "We cannot determine from the instant contract that the parties intended the relationship to continue during a particular interval, and nothing in the complaint suggests that the contract has lapsed by reason of external circumstances."

2. The quotation from *International Aerial* quoted by the Court of Appeals (appendix 4, at page 29 (is patently arguendo, without relevance to viable contracts, but related to a labor union agreement which had "lapsed by reason of external circumstances" of technology and business conditions, and the comment is specifically limited to situations "generally" and "usually" extant in the absence of proof of a "term of duration", "commensurate with the intentions of

the parties," in the "totality of the circumstances" whereas Jack Daniel (as well as Alpha) submitted and the District Court found "what the parties contemplated" (appendix 9, page 46) *upon the evidence in this case*—not what might be "generally applicable," "usually implies" and the like; and

3. The Court of Appeals disregarded the integrated rules of decision applied to the specific and indistinguishable factual situations wherein the distributor undertook to use its best efforts, to "do everything to propagate the brand to our best ability in this market," "promised . . . to allocate" had "substantially performed" for ten years, kept "separate records as to the amounts," "refrained from purchase of charcoal filtered whiskey . . . during the continuation of the contract" herein advanced by Alpha (appendix 9) and found, as facts, by the District Court in the application of the particular rules of decision by the California Supreme Court in *Bowman* (sub nom. *San Francisco Brewing Corp. v. Bowman,* 52 C.2d 607, 613, 614, 615).

Alpha was clearly entitled to the benefit of the findings and judgment of the District Court on its contract claim (appendix 6) and the destruction of these rights by the Court of Appeals in its judgment in the first appeal (appendix 4) was and is manifestly erroneous upon this record, prejudicially abusive of Alpha and should not become final.

2. As Related to Alpha's Tort Claim.

The District Court in its findings and first judgment simply made no findings of fact related to Alpha's

tort claim (CT 396:24-25) notwithstanding the extensive general findings of fact and the facts established without dispute that Jack Daniel had joined with Brown-Forman and Rathjen in causing Jack Daniel to repudiate its course of dealing with Alpha and that Brown-Forman and Jack Daniel had thereupon hired Parrott & Co. to switch Alpha's business with its 3,500 established customers to Rathjen, which findings related to the first judgment (CT 388:5 and 390:4) and were established by uncontradicted evidence, e.g., testimony of Robinson F. Brown (questions and answers by deposition numbered 374, 384, 314) Alpha's Exhibits 30 and 31, and the testimony of Mr. Gallagher of Parrott & Co. (RT 766:8-767:16), the latter in part:

> "Q. At that time, what if anything was done in respect to continuing, if *it was continued, the allocation arrangement* in respect to Jack Daniel products as far as you participated in it?
>
> A. *Well, we were informed that Rathjen Brothers would be the new distributor and we were to aid and abet them similarly to the way we did with Mr. DiGrazia.*
>
> * * *
>
> Q. In connection with what you did, was it the same or different from what you had been doing in respect to the Alpha firm?
>
> A. No, we tried to do the same thing that we had learned together in the business and we tried to aid and abet Rathjen . . .
>
> Q. Do I understand that *the customers who have been buying from Alpha were continued on the allocation system by Rathjen?*
>
> A. *Yes, sir.*

Q. Did you continue your activities in relation to Rathjen the same as you did in connection with Alpha or was there something different in that connection?

A. No, *it was the same arrangement that we had with Alpha.*"

In view of the uncontradicted proof of willful, conspiratorial, direct and effective interference with Alpha's independent dealings with its customers and the equally undisputed rule of tort liability in California for such conduct, it is manifest that the first judgment is contrary to both established fact and conceded legal principle.

See *Willis v. Santa Ana, etc., Ass'n,* 58 C.2d 806, 376 P.2d 568; *Buxbom v. Smith,* 23 C.2d 535, 547, 145 P.2d 705, and *Wise v. Southern Pacific Co.,* 223 C.A. 2d 50 and 1 C.3d 602. As noted in *Willis,* this principle of California tort law applies whenever such willful, direct and hurtful conduct is carried out, but does not rise to the level of an antitrust violation in restraint of trade. As particularly held in *Wise* (223 C.A.2d 50 and 1 C.3d 602) Jack Daniel is liable with its co-conspirators.

As declared in *Speegle v. Board of Fire Underwriters,* 29 C.2d 34, 172 P.2d 867, summarized by the Court of Appeal (appendix 4), these principles apply to Alpha's courses of dealing with its customers, even though such courses of dealing may have been "at will."

Alpha was obviously entitled to responsive findings and its proof required a holding that Jack Daniel and

Brown-Forman were liable for unlawful interference with Alpha's business with its customers and Alpha is entitled to an appropriate judgment.

3. As Related to Alpha's Antitrust Claims.

The Court of Appeal, in its first judgment, particularly and specifically remanded the proceeding to the District Court for further and responsive findings on the antitrust issues.[4] Notwithstanding, the only finding by the District Court was the thoroughly discredited assertion of self-interest (appendix 5) in carrying out the conceded combination and restraints established in the evidence without conflict.

It is not only undisputed (Alpha's Exhibits 1, 2, 3, 30, 31, 32, 33 and 35, respondent's concessions at page 32-66 reporter's transcript and testimony at pages 185-198, 1400-1441, 2223-2234 of the reporter's transcript and in the deposition of Robinson S. Brown, answers numbered 82-84, 92, 101-102, 274-284, 314, 348 and 351) but a matter of express judicial admission of respondents in their respective answers herein ("Ninth defense," filed ex parte on May 11, 1966, Clerk's transcript 258-260) that Alpha's termination was "justified" because Alpha would not cease dealing with Schenley Industries, a competitor of each of respondents, such admission reading (page 260) in part:

> ". . . Said manufacturer or distributor was and is commonly known as Schenley Industries, Inc.,

[4]The California rules of decision upon its common law and statute (section 16700 and following, of its Business and Professions Code, appendix 7) follow the rulings of the federal courts on questions arising under the Sherman Act and portions of Clayton Act (*Corwin v. Los Angeles Newspaper Service Bureau, Inc.*, 4 C.3d 842, 94 Cal.Rptr. 785, 484 P.2d 953).

a corporation, and its affiliated corporations and enterprises. (b) Plaintiff allowed a single manufacturer or distributor, to wit: *Schenley Industries, Inc., and its affiliates to so dominate plaintiff's total sales* as to unreasonably prejudice and endanger the efforts which plaintiff would use to distribute defendant Daniel's products."

"*By virtue* of said breaches of contract by plaintiff, and each of said breaches of contract, *defendant Daniels* was justified in discontinuing, and *did discontinue, its business relationship with plaintiff, and defendant Daniels thereby terminated* for good cause by existing contract between plaintiff and defendant Daniels, if any."

Such "retaliatory" and punitive conduct has been declared a per se violation of the antitrust laws—even in the most aggravating circumstances (*Fashion Originators Guild v. F&C*, 312 U.S. 457, 85 L.ed. 949 and *United States v. General Motors Corp.*, 384 U.S. 127, 146-147, 16 L.ed.2d 415, 426-428, followed in California under the state act, *People v. Santa Clara, etc. Ass'n.*, 238 C.A.2d 225, 234-235, 236, 47 Cal.Rptr. 570).

A further conceded purpose of switching Jack Daniel's products to Rathjen and switching Alpha's accounts to Rathjen was the inducement of Rathjen to adhere to Brown-Forman's unlawful resale price fixing scheme upon Brown-Forman's products. See Alpha's exhibits 30 and 31 reading in part:

". . . I have tried to avoid getting into details of the discounts[5] . . . *but it is obvious that our*

[5]Such discount practices violate California law (*Schenley Affiliated Brands Corp. v. Kirby*, 21 C.A.3d 177, 188; 98 Cal. Rptr. 609, hearing Supreme Court, denied).

> *gross profit is under 9% and we cannot operate under 10%* . . . I have also indicated that *we could probably expect some extra profit on the Jack Daniel matter, which you were going to recommend to your associates,* and we have also taken this into consideration, in our planning.
>
> * * *
>
> . . . There are many ways that we can operate within the law and still get extra business, *but you have pretty well got us tied down with the low margin of profit,* so we don't have room to do the proper entertaining, or whatever else is necessary."

and

> *"You mentioned the Jack Daniel which, of course, can be a great help in this respect. I have made my recommendation* here and it has been approved and *has been recommended to Jack Daniel.* This, of course, must be in strictest confidence. Certainly, *the next step is for you to approach Winton Smith again for Rathjen* and, of course, the dealings from then on would be with him. I recommend that the approach *not* be on the basis *that you have the Brown-Forman line and that the profit would be helpful, . . ."*

The record further demonstrates that respondents herein did not restrict their combination and acts to the termination of Alpha's exclusive distributorship of Jack Daniel's products—but that they thereafter proceeded to carry out in concert with Rathjen and Parrott & Co. every possible act designed and intended to switch Alpha's customers to Rathjen, thus, respondents hired Parrott & Co. and Rathjen to switch Alpha's business with its 3,500 customers to

Rathjen and to respondents, conduct indistinguishable from that held actionable by the Court in its leading case of *Albrecht v. The Herald Co.,* 390 U.S. 145, 150, 19 L.Ed.2d 998, 88 S.Ct. 869, stating the application principle, in relevant part:

> ". . . Given the uncontradicted facts recited by the Court of Appeals, there was a combination within the meaning of § 1 between respondent, Milne, and Kroner, and the Court of Appeals erred in holding to the contrary."

These salutary principles, as declared and enforced by the Court, have been followed by the Courts of Appeals, including among many, the case of *Tamaron Distributing Corporation v. Weiner,* 418 F.2d 137, 138 (7th Cir., 1969), in relevant part:

> "The activities of Milne and Kroner upon which the Supreme Court rested its conclusion as to their independent status are similar to those of Weiner. *The newspaper hired Milne to solicit customers away from Albrecht* . . . Milne and Kroner had no more independence than Weiner. Certainly Weiner's activities 'materially aided in the accomplishment of respondent's plan.' *Albrecht v. Herald Co.*, 390 U.S. 145, 150, 88 S.Ct. 869, 872, 19 L.ed. 2d 998 (1960)."

And by the District Courts, e.g., *Peerless Dental Supply Co. v. Weber Dental Mfg. Co.,* 299 F. Supp. 221, 334-335, in relevant part:

> ". . . But a different question is presented *where the manufacturer utilizes its position to directly support a new exclusive distributor in capturing the customers previously serviced by the distributor's predecessor . . .*"

Even the Court of Appeals for the Ninth Circuit has followed these rulings in comparable fact situations, e.g., in *Industrial Building Materials, Inc. v. Interchemical Corporation,* 437 F2d 1336, 1340-1343, (Ninth Circuit, 1971).

It must be further recalled that Brown-Forman was enabled to direct Jack Daniel to refuse to further deal with Alpha only because it had acquired the unique assets of its competitor, Jack Daniel, in circumstances violative of section 7 of the Clayton Act (15 U.S.C. 18, appendix 8).

The factual subject is a matter of collateral estoppel (*Jack Daniel Distillery v. United States,* supra, 379 F.2d 469).

Since respondents were enabled by Brown-Forman's acquisition of Jack Daniel's shares and assets to carry out their ruinous termination and post-termination activities which destroyed Alpha's business Alpha is entitled to seek redress under section 7 of the Clayton Act. (*New Jersey Wood, etc. Company v. Minnesota Mining, etc. Co.,* 379 U.S. 877, 13 L.ed. 2d 85; *Gottesman v. General Motors Corp.,* 414 F.2d 956, and *Dailey v. The Quality School Plan, Inc.,* 380 F.2d 484, 488).

It is clear that this question, clearly presented in this record, should have been lawfully resolved and, the evidence being undisputed, should be resolved in favor of Alpha upon its antitrust claims.

Assuming Jack Daniel's allocation scheme could be immunized in any circumstances, its abuse upon Jack Daniel's refusal to further deal with Alpha

(Reporter's transcript 766-767, quoted supra) clearly violated section 1 of the Sherman Act and the comparable state act (appendix 7) and the evidence would also support a ruling of an attempt to monopolize under section 2 of the Sherman Act (*Simpson v. Union Oil Co.*, 377 U.S. 13, 15-17, 12 L.ed2d 98; *United States v. Topco Associates, Inc.*, 405 U.S. 596, 31 L.ed.2d 515, and *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365, 87 S.Ct. 1856, 18 L.ed.2d 1249).

Since the Court of Appeals originally ruled that it required additional findings on the antitrust issues and questions and the District Court on the remand declined to make findings—only submitting the self-interest claim of respondents—the ruling that there were "findings" upon the remanded issues, as "a matter of opinion," surely begs the question and utterly fails to equate the inadmissible "findings" to the record—in which they (even if adequate in form) find no support whatever.

The uncontradicted evidence—even respondents' judicial admissions—advance a catalogue of antitrust violations, many of the per se category, to provide multiple rejections of the Court's rulings in the subject matter. These matters must be lawfully considered and resolved. Because we here consider fundamental public policy, state and federal, the Court of Appeals is not free to by-pass such questions—as by some pragmatic procedural ellipse, of no consequence.

While petitioner is reluctant to advance these matters to a busy Court, there appears to be no other resort for a fair and just hearing upon matters of

public interest resulting in the destruction of Alpha's business some thirteen years ago while its claims to redress have languished below in the intervening decade.

Notwithstanding the clear teachings of *Klor's, Inc. v. Broadway-Hale Stores,* 359 U.S. 207, 3 L.ed.2d 741, 79 S.Ct. 705; *Simpson v. Union Oil Co. of California,* 377 U.S. 13, 15-17, 12 L.ed.2d 98, 84 S.Ct. 1051; *Albrecht v. The Herald,* 390 U.S. 145, 150, 19 L.ed.2d 998; *United States v. Arnold Schwinn & Co., et al.,* 388 U.S. 365, 376, 87 S.Ct. 1856, 18 L.ed. 2d 1249; *United States v. Topco Associates,* 405 U.S. 596, and *Otter Tail Power Company v. United States,* 31 L.ed.2d 515 (supra), among many—it eventuates that the Court must again intercede in the public interest and direct the Court of Appeals to conform, and to direct the District Court to conform, to the principles so clearly declared, but so clearly abjured in this record and by these judgments.

Please note that the destruction of Alpha's business was not an isolated event—but a step in a national plan of conduct of respondents (see reporter's transcript 1342-1355 and 1504-1506, showing similar terminations and switches in similar circumstances affecting their distributors in 21 states).

CONCLUSION

For each of the reasons herein noted from the record below, it is respectfully submitted that Alpha's petition for writ of certiorari to the Court of Appeals should issue and the Court of Appeals should be thereupon directed to apply the rulings of the

Court herein noted to the issues and questions embraced in the opinions and judgments below and to enter appropriate judgments conforming to law and to the record herein.

There are appended hereto as appendices 3 and 4 the opinions of the Court of Appeals.

There are appended hereto as appendices 1, 2, 3 and 4 the judgments and orders of the Court of Appeals and, as appendices 5 and 6, the judgments of the District Court.

Dated, San Francisco, California,
June 25, 1974.

Respectfully submitted,
J. ALBERT HUTCHINSON,
Attorney for Petitioner,
Alpha Distributing Company.

(Appendices Follow)

Appendix 1

United States Court of Appeals
for the Ninth Circuit

No. 72-2776
(D.C. #39623-GBH)

Alpha Distributing Company of California, Inc.
Plaintiff/Appellant,
v.
Jack Daniel Distillery, Lem Motlow, Prop., Inc., Brown-Forman Distillers Corporation,
Defendants/Appellees.

[Filed Jan. 14, 1974]

ORDER STAYING ISSUANCE OF MANDATE

Upon application of J. Albert Hutchinson counsel for the Plaintiff/Appellant, and good cause appearing, It Is Ordered that the issuance, under Rule 41(a) of the Federal Rules of Appellate Procedure, of the certified copy of the judgment of this Court in the above cause be and hereby is stayed pending the filing, consideration and disposition by the Supreme Court of the United States of a petition for writ of certiorari to be made by the Plaintiff/Appellant herein, provided such petition is filed in the Clerk's Office of the

Supreme Court of the United States on or before June 30, 1974.

In the event the petition for writ of certiorari is granted, then this stay is to continue pending the final disposition of the case by the Supreme Court of the United States.

/s/ R. H. Chambers
United States Circuit Judge.

Dated: San Francisco, Calif.
June 12, 1974

Appendix 2

United States Court of Appeals
for the Ninth Circuit

No. 72-2776

Alpha Distributing Company of California, Inc.,
Plaintiff-Appellant,
vs.
Jack Daniel Distillery, Lem Motlow, Prop., Inc., a corporation, Brown-Forman Distillers Corporation, a corporation,
Defendants-Appellees.

[Filed May 31, 1974]

ORDER

Before: MOORE, CHAMBERS and ELY, Circuit Judges.

The late petition for rehearing will be filed.

The petition for rehearing is denied.

Appendix 3

United States Court of Appeals
for the Ninth Circuit

..... F.2d .....

No. 72-2776

Alpha Distributing Company of California, Inc.,
Plaintiff-Appellant,
vs.
Jack Daniel Distillery, Lem Motlow, Prop., Inc., a corporation, Brown-Forman Distillers Corporation, a corporation,
Defendants-Appellees.

[April 12, 1974]

On Appeal from the United States District Court
for the Northern District of California

Before: CHAMBERS, MOORE,* and ELY, Circuit Judges.

PER CURIAM:

The court previously remanded the case to make findings on specific issues. See Alpha Distributing

*The Honorable Leonard P. Moore, United States Circuit Judge for the second Circuit, sitting by designation.

Company of California, Inc., v. Jack Daniel Distillery, Lem Motlow Prop., Inc., 454 F.2d 442 (1972).

No further evidence was offered.

While it is a matter of opinion, it is our opinion that the district court did make the findings directed to be made.

Finding no error, we affirm.

Appendix 4

United States Court of Appeals
for the Ninth Circuit

454 F.2d 442

TC, 73,798

Alpha Distributing Company of California, Inc., also doing business under the name and style of Alpha Distributing Company, Inc., Plaintiff, Appellee, Cross-Appellant, vs. Jack Daniel Distillery, Lem Motlow, Prop., Inc., a corporation; Brown-Forman Distillers Corporation, a corporation, Defendants, Appellants, Cross-Appellees.	Nos. 24,541 24,542 24,561

[January 6, 1972]

Appeals from the United States District Court
for the Northern District of California

Before: MADDEN, Judge of the United States Court of Claims,* HAMLEY and TRASK, Circuit Judges

HAMLEY, Circuit Judge:

Alpha Distributing Company of California, Inc. (Alpha),[1] brought this action against Jack Daniel Distillery, Lem Motlow, Prop., Inc. (Jack Daniel), Brown-Forman Distillers Corporation (Brown-Forman), and others,[2] for damages, and for injunctive and declaratory relief, because of Jack Daniel's termination of Alpha's whiskey distributorship. Alpha commenced the action in the Superior Court of the State of California in and for the City and County of San Francisco. Jack Daniel removed the case to the United States District Court because of diversity of citizenship.

In its complaint Alpha made three claims against defendants, namely that in terminating the distributorship, defendants: (1) breached an oral distributorship contract, (2) violated California antitrust statutes, and (3) interfered with contractual rights and business relations between Alpha and Jack Daniel. After Jack Daniel removed the case to the federal court, Alpha filed a supplement to its complaint alleging, as a fourth claim, that defendants had violated federal antitrust statutes. Alpha sought damages in the sum of $2,125,000

*The Honorable J. Warren Madden, Senior Judge of the United States Court of Claims, sitting by designation.

[1]"Alpha" as used herein includes plaintiff's predecessor.

[2]Only defendants Jack Daniel and Brown-Forman were served and appeared at the trial. They will sometimes be referred to herein as "defendants."

on each claim (but not cumulative), a trebling of the damages assessed, and reasonable attorneys' fees.

Jack Daniel and Brown-Forman answered, denying the critical allegations of the complaint and supplement thereto. Jack Daniel also counterclaimed for $36,885.00, for whiskey sold and delivered to Alpha and not paid for. The counterclaim was not contested.

At the conclusion of a lengthy non-jury trial, the district court determined that Jack Daniel was liable to Alpha for damages for breach of contract. It determined all other claims in favor of defendants. These determinations are evidenced by a memorandum of decision, findings of fact and conclusions of law on the issue of liability.

The court reserved the issue of damages on the first claim and appointed a special master to report thereon. In due course the special master filed a report and account, recommending that Alpha be awarded damages in the sum of two hundred and five thousand dollars on its first claim.

Proceedings were had thereon, the result being that the district court accepted the special master's recommendation, deducted therefrom the amount of Jack Daniel's uncontested counterclaim, and awarded Alpha judgment in the sum of $168,115 against Jack Daniel on its first claim. The judgment recites that in its memorandum of decision, findings of fact and conclusions of law, previously filed, defendants were awarded judgment on the second, third and fourth claims. However, the decretal provisions of the judgment make no reference to those claims.

Jack Daniel appeals from the judgment against it on the first claim and, on the remaining three claims, insofar as the judgment expressly fails to award judgment for it on those claims.[3] Brown-Forman appeals from the judgment insofar as the decretal provision thereof fails expressly to award judgment in its favor and against Alpha on all four claims. Alpha cross-appeals from the judgment insofar as it awards judgment for defendants on the second, third and fourth claims. An earlier stage of this controversy was before this court in 304 F.2d 451 (9th Cir. 1962).

We reverse the judgment insofar as it awards recovery to Alpha on the first claim. We affirm the judgment insofar as it denies recovery to Alpha on the third claim. The cause will be remanded for supplemental findings and conclusions on the second and fourth claims, and for entry of an amended judgment in favor of defendants on the first and third claims. The judgment on remand should also reflect an award in favor of Jack Daniel in the sum of $36,885.00 upon its uncontested counterclaim.

The background facts stated below are drawn largely from the district court's memorandum of decision and findings of fact.

In 1950 Jack Daniel was a small Tennessee distillery owned and operated by the Motlow family, making a

[3]Jack Daniel's notice of appeal also recites that the judgment is appealed from insofar as it "fails to award to this defendant affirmative relief against plaintiff on defendant's counterclaim. . . ." Presumably this recital was intended only to preserve Jack Daniel's position that it is entitled to an affirmative award in the event it prevails on its challenge to the damage award to Alpha on the first claim.

high-grade sour or bourbon mash leached (charcoal filtered) whiskey. Alpha was a licensed wholesale distributor and importer of alcoholic beverages in the state of California. Alpha, a California corporation, maintained its principal office at San Francisco, and sales offices in other places in the northerly part of the state. Brown-Forman is a Delaware corporation engaged in the manufacture of distilled spirits in the state of Kentucky, which products were sold in interstate commerce and in the state of Kentucky.

On or about August 4, 1950, D. E. Motlow, acting for Jack Daniel, became acquainted with Loris M. diGrazia, president of Alpha. Jack Daniel's products were then virtually unknown to the trade in California and were in limited supply; but an additional supply of aged Jack Daniel whiskeys was anticipated in 1951 and thereafter.[4]

At their August 4, 1950 meeting Motlow and diGrazia discussed a proposal that Alpha become the exclusive distributor for Jack Daniel products in Northern California, and basic understandings concerning such an exclusive distributorship were expressed. These understandings were confirmed in subsequent telephone conversations and correspondence. During October, 1950, Alpha placed its first order, and was

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[4]The trial court found that Jack Daniel was the only "legal distillery in Tennessee," its products were unique, irreplaceable and constituted the only Tennessee whiskeys then made for lawful sale. This whiskey was designated as a separate category of whiskey under regulations promulgated under the Federal Alcohol Administration Act, 27 U.S.C. § 201, et seq. *See also, Jack Daniel Distillery, Inc. v. Hoffman Distilling Co.*, 190 F.Supp. 841, 843 (W.D. Ky. 1960).

supplied with some three hundred cases of Jack Daniel's Black Label whiskey during 1950.

Alpha immediately commenced to "pioneer" the distribution of Jack Daniel products is an "excellent manner." It supplied local advertising sales aids, sampling and other promotional and sales activities and support. During 1954 Alpha assigned a sales executive as "brand manager" of Jack Daniel's whiskeys, a function customarily carried out by distillers in aid of their distributors. In the early period of Alpha's distributorship, Jack Daniel did not provide any local advertising or promotion for its products.

In mid-1951, Jack Daniel appointed Parrott & Co., a California corporation (Parrott), as its broker in eleven of the western states of the United States. Alpha's purchases and sales of Jack Daniel's products progressively increased, from two thousand seven hundred cases in 1951 to ten thousand four hundred and nine cases in 1955. During 1954, Jack Daniel curtailed its distillation of whiskey, closing its operations for several months. This resulted in lesser quantities of aged whiskeys maturing in 1958 and 1959.

In early 1956, Jack Daniel advised Alpha that a shortage of its products in relation to sales was anticipated. Because of this, Jack Daniel advised, sales to Alpha and other purchasers would be rationed or allocated to Jack Daniel's existing customers on an equitable basis as related to 1955 purchases. Jack Daniel requested Alpha to similarly allocate its supplies to Alpha's existing customers for Jack Daniel products. Such allocation to Alpha by Jack Daniel and by

Alpha to its established customers continued until the distributorship was terminated, as described below.

On August 25, 1956, Brown-Forman formed a new corporation under the Jack Daniel name, which corporation acquired the old Jack Daniel corporation four days later. The old corporation was thereupon liquidated. Brown-Forman held all of the capital stock of the new Jack Daniel.

The original oral distributorship contract was amended in certain respects, the most recent as of October 27, 1958. These amendments pertained to (1) the expansion and contraction of Alpha's exclusive territory, and (2) Jack Daniel's allocation scheme. There were no amendments with regard to the duration or manner of terminating the contract.

On October 31, 1960, Jack Daniel gave Alpha written notice that the distributorship would be terminated effective December 31, 1960. No cause was stated for this termination. On December 31, 1960, Alpha ha in excess of three thousand five hundred customers in its exclusive territory for Jack Daniel whiskey.

Upon its refusal to further deal with Alpha, Jack Daniel furnished its products to Rathjen Bros. of California and Rathjen Bros. of Oakland (Rathjen) which had been Brown-Forman's distributor. Rathjen had been a competitor of Alpha in the distribution of distilled spirits at wholesale in Alpha's exclusive Jack Daniel territory. Rathjen assumed and continued Alpha's system of allocation of Jack Daniel products to Alpha's established customers as requested by Jack

Daniel, and as aided by Parrott as Jack Daniel's broker-agent.

As a basis for its breach of contract claim against Jack Daniel, Alpha alleged in its complaint that, by the terms of the oral contract for an exclusive distributorship of Jack Daniel's products in Northern California, the parties agreed that Alpha should remain and continue as Jack Daniel's exclusive distributor as long as Alpha performed its undertakings thereunder. According to Alpha, it was understood that Alpha's exclusive distributorship should not and would not be terminated without good cause.

The trial court determined that these allegations had been proved. The court specifically found that under the oral contract, the distributorship was not to be terminated, except for cause.[5] The court further found that Jack Daniel terminated the distributorship without cause, this constituting a material breach of the contract. The court also found that, after December 31, 1960, Alpha desired, intended and attempted to carry out its undertakings under the contract. On the basis of these findings the trial court concluded that Jack Daniel wrongfully breached and repudiated the decribed contract without cause or justification, to Alpha's injury and damage.

Jack Daniel argues on its appeal that the trial court's determination that the oral distributorship con-

[5]The trial court also found that, under the contract, Alpha had a continuing option to require Jack Daniel to continue to deal with Alpha so long as Alpha desired to purchase Jack Daniel's products for resale and performed its undertakings under the contract and so long as the purposes of the contract could be lawfully carried out.

tract was terminable only for cause is either an incorrect legal conclusion or a clearly erroneous finding of fact. Alpha, in response, contends that the determination is supported by the record.

However, in its brief in this court, Alpha itself concedes that the original oral understanding was that there was to be a continuing business, but that there was no time limit or expressly agreed-upon means of terminating the arrangement. Under the evidence, as Alpha concedes, there was not "any discussion of termination," but only that "we would do business and hoped that we would grow."

An appendix to Alpha's brief sets forth abstracts of testimony of the witnesses who participated in negotiating the distributorship agreement. The testimony there reviewed indicates that the distributorship was to be exclusive, but there was no testimony that the duration of the contract or a method of termination was expressly agreed upon. Loris diGrazia, president of Alpha, was not even asked about the duration of manner or terminating the contract. D. E. Motlow, who represented Jack Daniel, testified that "nothing was said about any duration of time." Motlow further testified that there "was the idea of it being a continuing business," but added that nothing was said about a time limit or means of terminating the arrangement.

Our review of the record also convinces us that the parties to the contract did not expressly agree that the contract was to be terminable only for cause. We have found no indication of any such agreement. It

follows that the trial court's determination, insofar as it is intended to be a finding of fact that Jack Daniel and Alpha expressly agreed that the distributorship would be terminable only for cause, is clearly erroneous.

But Alpha argues, in effect, that where a distributorship for a particular area is exclusive, and there is no specific agreement to the contrary, the distributorship is, as a matter of law, terminable only for cause. The trial court did not articulate such a reason for its determination. Nevertheless, we have examined the cases and texts relied upon by Alpha for this proposition and conclude that it is not supported by substantial authority.

In making this argument, Alpha places principal reliance upon *Burgermeister Brewing Corporation v. Bowman,* 227 Cal.App.2d 274, 38 Cal.Rptr. 597 (1964). It is true that *Burgermeister* involved an exclusive distributorship and that the court held that the arrangement was terminable only for cause. But the court did so on the basis of a determination that there was substantial evidence supporting the jury's implied finding that there existed between the parties an oral contract creating a beer distributorship "for an expressly agreed-upon term, to-wit: as long as Bowman should continue to use his best efforts to promote and solicit the sale of the brewery's products and 'took care of the territory;' . . ." (227 Cal.App.2d at 277; 38 Cal.Rptr. at 599). The court quoted specific testimony to the effect that there was an express understanding of this kind.

The rule of *Burgermeister,* then, is that where parties expressly agree that the exclusive distributorship shall continue while the distributor exercises his best efforts, the contract is terminable only for cause. *See also Mangini v. Wolfschmidt, Ltd.,* 192 Cal.App.2d 64, 13 Cal.Rptr. 503 (1961). Neither the cases cited above, nor any of the other authorities cited by Alpha, stand for the broad proposition that, absent evidence of agreement to the contrary, an exclusive distributorship is terminable only for cause.

The true Calfornia rule, where a contract for an exclusive distributorship fails to fix a definite term of duration, was most recently announced in *International Aerial Tramway Corp. v. Konrad Doppelmayr & Sohn,* 70 Cal.2d 400, 74 Cal.Rptr. 908, 450 P.2d 284 (1969). That case involved a contract granting the exclusive sales rights on most of the North American continent for Doppelmayr ski lifts. By way of announcing the rule to be applied, the California Supreme Court quoted (at 450 P.2d 288) from its opinion in *Consolidated Theatres, Inc. v. Theatrical Stage Employees Union, Local 16,* 69 Cal.2d 713, 73 Cal. Rptr. 213, 447 P.2d 325 (1968), saying:

> "We pointed out [in *Consolidated Theatres*] that 'While the initial effort of the court, in construing contracts of continuing performance or forbearance which contain no express term of duration, must always be that of implying a term of duration commensurate with the intentions of the parties, in some cases the nature of the contract and the totality of surrounding circumstances give no suggestion as to any ascertainable term. In

such cases the law usually implies that the term of duration shall be at least a reasonable time, and that the obligations under the contract shall be terminable at will by any party *upon reasonable notice* after such a reasonable time had elapsed. (Citations.) *This rule is generally applicable, for instance, to exclusive sales agency and distributorship contracts.'* (Italics added; footnotes omitted.) (69 A.C. at pp. 756-757, 73 Cal.Rptr. at p. 223, 447 P.2d at p. 335.)"

In the present case, as we have indicated above, the evidence does not suggest that the contract between Alpha and Jack Daniel had any ascertainable term of duration. We have decided that the trial court's findings as to duration were clearly erroneous. It follows that, under the rule quoted above, the law implies that the duration of the distributorship shall be at least a reasonable time, and that the obligations under the contract shall be terminable at will by any party upon reasonable notice after such reasonable time has elapsed.

Alpha's distributorship for Jack Daniel lasted for more than ten years, from August 4, 1950 to October 31, 1960, when notice of termination was given. That appears to us to be a reasonable duration of this distributorship and the trial court did not find to the contrary. Jack Daniel then gave three months' notice that the distributorship would be terminated on December 31, 1960. That also appears to us to be reasonable notice and, again, the trial court did not hold to the contrary.

We conclude that, under the applicable California rule, Jack Daniel terminated the oral exclusive distributorship at a time and in a manner which did not constitute a breach of the oral contract. The trial court therefore erred in holding Jack Daniel liable on the breach of contract claim. It is unnecessary for us to consider Jack Daniel's statute of frauds defense on this claim, or any of the issues pertaining to the amount of damages for breach of contract.

We turn now to Alpha's cross-appeal from the district court judgment insofar as that judgment denied Alpha relief on its second, third and fourth claims.

In its third claim, Alpha alleged that, on or about October 31, 1960, defendants individually and in concert with others, and without cause, justification, excuse or privilege, wrongfully interfered and ever since have continued to interfere with the contracts and business relationships existing between Jack Daniel and Alpha. Alpha further alleged that defendants wrongfully induced and persuaded Jack Daniel to repudiate and breach its contract with Alpha and to refuse and refrain from further performance of its undertakings to Alpha thereunder.

Jack Daniel and Brown-Forman answered with general denials and other defenses. The trial court, upon the basis of its general findings of fact, concluded that defendants are entitled to judgment on this claim. On appeal Alpha urges that the denial of relief upon its third claim "constituted clear error on the face of the record and uncontradicted evidence."

Tortious interference with business relations is actionable in California. The governing principle has often been stated in terms of inducing breach of contract.[6] However, a more precise statement of the principal makes it clear that an action may lie even though no actual breach of contract was induced. Thus, in *Herron v. State Farm Mutual Ins. Co.*, 56 Cal.2d 202, 14 Cal.Rptr. 294, 363 P.2d 310, 312 (1961), the court announced this rule:

> "An action will lie for the intentional interference by a third person with a contractual relationship either by unlawful means or by means otherwise lawful when there is a lack of sufficient justification."[7]

Under this broader statement of the principle, interference with contractual relations of others may be tortious even though the contract is terminable at will. *Speegle v. Board of Fire Underwriters*, 29 Cal.2d 34, 172 P.2d 867, 870 (1946). Thus the fact that Alpha's

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[6]For example, in *Imperial Ice Co. v. Rossier*, 18 Cal.2d 33, 112 P.2d 631, 632 (1941), the court said:

> "It is universally recognized that an action will lie for inducing breach of contract by a resort to means in themselves unlawful, such as libel, slander, fraud, physical violence, or threats of such action. . . . Most jurisdictions also hold that an action will lie for inducing a breach of contract by the use of moral, social, or economic pressures, in themselves lawful, unless there is sufficient justification for such inducement."

[7]With reference to the affirmative defense of justification, the *Herron* court said:

> "Whether an intentional interference by a third party is justifiable depends upon a balancing of the importance, social and private, of the objective advanced by the interference against the importance of the interest interfered with, considering all circumstances, including the nature of the actor's conduct and the relationship between the parties." 363 P.2d, at 312.

distributorship with Jack Daniel was terminable at will, does not preclude Alpha from recovery on its third claim.[8]

It is unquestionably true that Brown-Forman acted to bring about the switch of the Jack Daniel distributorship from Alpha to Rathjen. But Alpha does not point to any circumstance indicating that such action was in itself unlawful, because of libel, slander, fraud, physical violence, or threats of such action, to employ the formulation of the rule set out in the *Imperial Ice Co.* case, quoted in note 6.

Nor does the record show that, apart from possible antitrust implications, Brown-Forman lacked justification for its action. That company is the sole stockholder of Jack Daniel. In the *Chicago Title Insurance Co.* case cited in note 8, the court made it clear that one with a financial interest in the business of another is privileged so long as he does not employ improper means "but acts merely to protect his financial interest or promote the other's welfare. . . ." 44 P.2d at 490. This view was announced with regard to a claim of tortious interference with prospective business advantage rather than tortious interference with an existing contractual relationship, but we think it is also applicable in the latter circumstance.

Apart from the position of Brown-Forman, Alpha, in its brief, states:

[8]It is true that, since *Herron, supra,* the courts of California have sometimes returned to the earlier statement phrased in terms of breach of contract. *See, e.g., Chicago Title Ins. Co. v. Great Western Financial Corporation,* 69 Cal.2d 305, 70 Cal.Rptr. 849, 444 P.2d 481, 490 (1968). But it is probable that, in these instances, the court used "breached" as a synonym for "terminated."

> "The conspiracy of Wirtz, Consolidated, Rathjen, Brown . . . Parrott & Co. and Jack Daniel (see testimony and correspondence cited and quoted in Part One of this filing, supra, and hereinafter) to induce the breach of Alpha's contract is explicit, uncontradicted and not open to reasonable conflicting inferences and defendants proffered no evidence in contradiction."

To the extent that we have succeeded in finding the testimony thus referred to in Alpha's blanket reference quoted above, we conclude that the evidence does not establish a claim against Jack Daniel for tortious business interference. Apart from antitrust considerations, to be explored below, Jack Daniel had a legitimate business interest in terminating the distributorship with Alpha. It had the right to terminate that arrangement at will, and without cause, after the lapse of a reasonable time, free of liability. The fact that it utilized the assistance of others in formulating the business judgment to exercise this right did not, apart from possible antitrust implications, make Jack Daniel liable for exercising that right. We need not consider whether those (other than Brown-Forman) who assisted Jack Daniel in making this decision are liable, for those others are not defendants in this action. *See* note 2. In our opinion the trial court did not err in awarding judgment for both defendants on Alpha's third claim.

Alpha's cross-appeal also challenges the judgment for defendants on the state and federal antitrust issues embraced in Alpha's second and fourth claims.

In its second claim, pertaining to California antitrust statutes,[9] Alpha alleged that Brown-Forman and Jack Daniel had unlawfully conspired and agreed together, and with others. These others, according to Alpha, included Rathjen, Consolidated Enterprises, Inc., Parrott & Company, all corporations, and the following individuals: Robinson S. Brown, Jr., Winton E. Smith, Robert Harbour, Arthur M. Wirtz, Robert L. Minkler and John Gallagher. The purposes of this conspiracy and agreement, Alpha asserted, were to:

1. carry out restrictions in trade and prevent competition in the sale of merchandise, to-wit: distilled spirits in sections of Northern California (such as Schenley products);

2. wrongfully exclude Alpha from the purchase and resale of licensed retailers of distilled spirits, particularly Jack Daniel whiskeys; and

3. wrongfully create, maintain and enforce a monopoly in sections of Northern California in respect to Tennessee whiskeys.

In its fourth claim, pertaining to federal antitrust statutes,[10] Alpha reasserted the factual basis for its second claim.

Alpha asserts that, in this fourth claim, it alleged as an additional ground, the allegation that, in the acquisition of the assets of Jack Daniel by Brown-Forman, defendants restricted trade and commerce in

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[9]Particularly sections 16720-16758, Cal. Business and Professional Code, provisions of the Cartwright Act.

[10]Particularly sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2.

distilled spirits in a portion of the United States, particularly in:

1. the elimination of competition therein by removing from competition Jack Daniel as a competitor of Brown-Forman in the business of manufacturing and selling distilled spirits;

2. the elimination of an independent source of supply of Tennessee whiskeys available to Alpha; and

3. the termination of such supply to Alpha on December 31, 1960, in violation of section 7 of the Clayton Act 15 U.S.C. § 18.

Jack Daniel, however, denies that any such additional ground was added to the issues in the case. We find no such claim asserted in either the initial complaint or the supplement thereto, and there was no pretrial order defining the issues. Nor do we find facts alleged in the pleadings which would give rise to an unarticulated claim of this kind. The memorandum opinion of the trial court makes no reference to such an issue. In Alpha's answering brief Alpha quotes what purports to be its restatement of its claims for "purposes of trial," but it provides no record reference as to where this quoted statement may be found, and we have been unable to find it.[11] We conclude that

[11]In its reply brief on the cross-appeal, Alpha provides two references as to where facts concerning this asserted merger claim may be found in the record. One of these references pertains to wholly different matters. The other pertains to allegations in the complaint pertaining to acquisitions by Brown-Forman, which allegations were later stricken from the complaint on Alpha's motion to amend. Alpha also gives a record reference to a quotation, in the memorandum opinion, of portions of the complaint pertaining to Brown-Forman acquisitions. But this quotation by the trial court records only the fact that these allegations were stricken from the complaint on Alpha's motion.

there is, in this case, no issue pertaining to a violation of section 7 of the Clayton Act, 15 U.S.C. § 18, because of Brown-Forman's acquisition of Jack Daniel.

Jack Daniel and Brown-Forman answered with general denials and other defenses with regard to the federal and state antitrust claims. The trial court, upon the basis of its general findings of fact, concluded that defendants are entitled to judgment on these (second and fourth) claims.

The substance of Alpha's antitrust position, insofar as it has possible merit, is that defendants combining and conspiring with each other, and others, and with a purpose to hamper competition by Schenley products by switching the Jack Daniel distributorship from Alpha to Rathjen, damaged Alpha in its business and property by causing the destruction of:

1. its contract rights;

2. its right to purchase its requirements of Jack Daniel's products in the usual course (with, or without, a contract); and

3. its good will (a) as related to the general subject matter and (b) as related to its allocated customers—"both of the latter as appropriated to defendants and Rathjen."

To a substantial extent, Alpha's antitrust claims are thus essentially a reassertion of Alpha's claims based upon the asserted breach of the Alpha-Jack Daniel distributorship contract, and upon the defendants' asserted tortious interference with business relations between Alpha and Jack Daniel. As determined above, however, the contract and tortious interference claims

are without merit. Apart from those two elements, the antitrust claims at issue here are essentially grounded upon Jack Daniel's "refusal to deal" with Alpha after December 31, 1960.

It is not a *per se* violation of the antitrust laws for a manufacturer or supplier to agree with a distributor to give him an exclusive franchise, even if this means cutting off another distributor. *Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke & Liquors, Ltd.*, 416 F.2d 71, 76 (9th Cir. 1969) *and cases there cited.* Moreover, without more, it is not a *per se* violation for the manufacturer or supplier to combine or conspire with others to make a change in its exclusive franchises, cutting off the supply of a former distributor. *Hawaiian Oke, supra,* at 76. Thus, in this case, the fact that Jack Daniel, with or without the encouragement of Brown-Forman, determined to change its exclusive distributorship from Alpha to Rathjen and the further contention that Jack Daniel, Brown-Forman, Rathjen, and others combined to make that decision have, standing alone, no antitrust significance.[12]

The critical inquiry in such "refusal to deal" cases is not whether there was a refusal to deal, or whether a refusal to deal was carried out by agreement with others, but rather whether the refusal to deal, manifested by a combination or conspiracy, is so anti-competitive, in purpose or effect, or both, as to be an unreasonable restraint of trade. *Hawaiian Oke, supra,*

[12]Thus we do not rely upon Jack Daniel's contention that the arrangement with Rathjen came after termination of the Alpha distributorship.

at 77-78; *Walker Distributing Co. v. Lucky Lager Brewing Co.*, 323 F.2d 1, 7 (9th Cir. 1963). This inquiry is primarily a factual one, and its resolution often requires determination of motive or intent. *Hawaiian Oke* and *Walker* both contain abundant discussion concerning the factual elements to be weighed in resolving the issue, as do other cases dealing with the problem. *See, e.g., United States v. Arnold, Schwinn & Co.*, 388 U.S. 365 (1967); *United States v. Parke, Davis & Co.*, 362 U.S. 29 (1960); *Beverage Distributors, Inc. v. Olympia Brewing Co.*, 440 F.2d 21 (9th Cir. 1971); *Scanlan v. Anheuser-Busch, Inc.*, 388 F.2d 918 (9th Cir. 1968).

In the present case, the facts concerning the possible anticompetitive purpose or effect of the change in Jack Daniel's distributorship were very much in issue. The controversy pertained primarily to the possible effort of defendants and others to hamper competition by Schenley products which were also distributed by Alpha. *(See* note 14, *infra.)* Considerable evidence was presented by both sides. However, the findings of fact and memorandum opinion entered by the trial court bear almost entirely upon Alpha's breach of contract claim, and are devoid of all but the most peripheral references to the factual issues presented on the antitrust claims. The single conclusion of law entered on both the state and federal antitrust claims recites only that defendants are entitled to judgment thereon. With the record in this state, we are unable to decide whether the decision of the district court on these claims is correct.

Findings of fact are required under Rule 52(a), F.R. Civ.P. The findings should be explicit enough to give the appellate court a clear understanding of the basis of the trial court's decision, and to enable it to determine the ground on which the trial court reached its decision. *Irish v. United States,* 225 F.2d 3, 8 (9th Cir. 1955). *See Civil Aeronautics Board v. Friedkin Aeronautics,* 246 F.2d 173 (9th Cir. 1957). If the findings fail to provide such an understanding and a factual basis for the conclusion, the appellate court may appropriately vacate the judgment and remand the cause to the district court for supplemental findings of fact.

The appellate court is not the trier of facts and does not ordinarily make findings of fact. *Freidkin, supra,* at 177; *Irish, supra,* at 8. *See United States v. Marchese,* 341 F.2d 782, 793-795 (9th Cir. 1965). We are cognizant of the rule that, where a full understanding of the issues can be reached without the aid of findings, this court is not required to remand the judgment because of the district court's failure to comply fully with Rule 52(a). *Seligson v. Roth,* 402 F.2d 883, 887 (9th Cir. 1968).[13] However, the failure of the district court to make findings on the antitrust claims in the present case leaves us without basis for decision on crucial factual issues in the face of voluminous and

[13]We apply this rule, in fact, in affirming the district court judgment for defendants on the third claim, for tortious interference with business relations. The findings of fact have little relevance to that claim, but our review of the record and our examination of the applicable law, both indicated above, are sufficient to give us a clear understanding of the issues on that claim. We have, accordingly, proceeded to a decision on those issues.

contradictory evidence in the record.[14] As a consequence, we have no way of knowing whether the district court's decision in favor of defendants on those claims was based on resolution of the determinative facts in their favor; or whether the court erroneously concluded that a switch in the distributorships could, under no circumstances have antitrust implications. *See Walker, supra,* 323 F.2d at 6-8.

We therefore conclude that supplemental findings of fact and appropriate conclusions of law must be entered with respect to the antitrust claims. Nothing in this opinion is intended to suggest what those findings and conclusions should be.

In summary, we reverse the judgment insofar as it awards recovery to Alpha on the first (contract) claim; affirm the decision of the court in favor of Jack Daniel and Brown-Forman on the third (tortious interference) claim, but remand the cause with directions that such decision be reflected in the decretal provisions of an amended judgment; and request the district court to make supplemental findings of fact and appropriate conclusions of law, reflected in the decretal provisions of the amended judgment, with

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[14]There was extensive testimony concerning Jack Daniel's motive for terminating Alpha's distributorship. Alpha contends the action was taken, at least in part, in anticipatory retaliation against the Schenley distilleries, whose products Alpha carried, thus implying an anticompetitive motive. Jack Daniel and Brown-Forman, on the other hand, contend that Jack Daniel terminated because of Alpha's financial position vis-a-vis Schenley, as a matter of sound business judgment. The findings make no reference to the issue, which we think critical in determining whether Jack Daniel's termination was anticompetitive in purpose or effect. This single example is not necessarily the only fact determination which the district court should make on remand.

regard to the second and fourth (antitrust) claims, which decretal provisions shall also reflect an award in favor of Jack Daniel in the sum of $36,885.00 upon its uncontested counterclaim. Either party may appeal from the amended judgment, but only insofar as it disposes of the second and fourth claims, in which event the appeal may be heard upon the present record and briefs as appropriately supplemented.

Appendix 5

In the United States District Court
For the Northern District of California

Civil No. 39,623

Alpha Distributing Company of California, Inc., also doing business under the name and style of Alpha Distributing Company, Inc.,
Plaintiff,

vs.

Jack Daniels Distillery, Lem Motlow Prop., Inc., a corporation; Brown-Forman Distillers Corporation, et al.,
Defendants.

[Filed June 23, 1972]

JUDGMENT

Heretofore this cause was determined in this Court. Thereafter, upon appeal, certain determinations herein were made by the United States Court of Appeals for the Ninth Circuit and the cause was remanded to this Court with directions for further proceedings, all as appears from the introductory part of the Supplemental Findings of Fact and Conclusions of Law heretofore made and filed herein on June 23, 1972. And now, agreeably to the said directions of the United States Court of Appeals for the Ninth Circuit and

upon the Supplemental Findings of Fact and Conclusions of Law made herein,

It is Ordered and Adjudged as follows:

1. That the plaintiff take nothing and that its action be dismissed on the merits; and

2. That defendant and cross-claimant Jack Daniel Distillery, Lem Motlow Prop., nc., recover of plaintiff and cross-defendant Alpha Distributing Company of California, Inc. (sometimes doing business under the name and style of Alpha Distributing Company, Inc.) the sum of Thirty-six Thousand Eight Hundred and Eighty-five Dollars ($36,885.00), with interest thereon at the rate of seven per cent (7%) per annum, as provided by law, from the 6th day of January, 1961; and

3. That said defendant and cross-claimant Jack Daniel Distillery, Lem Motlow Prop., Inc., and defendant Brown-Forman Distillers Corporation recover of said plaintiff their costs of action taxed at

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Dated: June 23, 1972.

/s/ Geo. B. Harris
United States District Judge

Appendix 6

J. Albert Hutchinson
55 New Montgomery Street
San Francisco, California 94105
Telephone: 392-0125
Attorney for Plaintiff

In the United States District Court for the Northern District of California, Southern Division

Civil Action No. 39,623

Alpha Distributing Company of California, Inc., also doing business under the name and style of Alpha Distributing Company, Inc., Plaintiff,

vs.

Jack Daniels Distillery, Lem Motlow Prop., Inc., a corporation; Brown-Forman Distillers Corporation, a corporation, Defendants.

[Filed March 24, 1969]

JUDGMENT AND DECREE

The above-entitled cause came on regularly for trial of the issues of liability arising under the first, second, third and fourth causes of action of plaintiff's complaint, as amended, and the answers thereto of defendants, as amended, before the court sitting with-

out a jury, J. Albert Hutchinson appearing as counsel for plaintiff, and Arthur B. Dunne appearing as counsel for defendants, and the Court by its Memorandum of Decision, Findings of Fact and Conclusions of Law on Issues of Liability dated and filed November 1, 1968, having awarded and ordered judgment on the issues of liability upon said respective second, third and fourth causes of action of plaintiff's complaint, as amended, in favor of defendants and against plaintiff and upon the first cause of action set forth in plaintiff's complaint, as amended, in favor of plaintiff and against defendant Jack Daniel Distillery, Lem Motlow Prop., Inc., a corporation, and having therein reserved the issues of damages and directed the taking of evidence upon the reserved issues of plaintiff's damages, the cause came on regularly for further trial on notice and order upon the issues of damages on the 14th day of November, 1968, evidence was received upon said reserved issues of damages and the Court on said day having appointed a Special Master to make a report and account in accordance with Rule 53, Federal Rules of Civil Procedure, for the assistance of the Court, and the Special Master having filed his report and account on January 21, 1969, and the respective parties filed their objections and exceptions thereto and the same having been heard by the Court on February 3, 1969, the Court, on March 10, 1969, approved said report and account of said Special Master, overruled the objections and exceptions of the respective parties thereto, and adopted said report and account of said Special Master and made its findings of fact and conclusions of law with respect

to the reserved issues of damages as set forth in its Order Approving Report and Account of Special Master, dated and filed March 10, 1969, and found plaintiff's damages upon said first cause of action of plaintiff's complaint, as amended, for plaintiff's loss of profit in the sum of One Hundred Seventy-five Thousand and No/100 Dollars ($175,000.00), and for loss of good will in the sum of Thirty Thousand and No/100 Dollars ($30,000.00), aggregating the sum of Two Hundred and Five Thousand and No./100 Dollars ($205,000.00), as such damages suffered by plaintiff upon the breach of the contract by and between plaintiff and defendant Jack Daniel Distillery, Lem Motlow Prop., Inc., a corporation, set forth in said first cause of action of plaintiff's complaint, as amended, and directed that the amount claimed by defendant Jack Daniel Distillery, Lem Motlow Prop., Inc., a corporation, upon its counterclaim filed in said action in the amount of Thirty-Six Thousand Eight Hundred Eighty-five and No/100 Dollars ($36,885.00) be offset by the Court as against plaintiff's recovery pursuant to stipulation of the parties to said action, executed by the parties and dated September 21, 1967, and determined plaintiff's said damages upon plaintiff's said first cause of action of its complaint, as amended, in the net amount of One Hundred Sixty-Eight Thousand One Hundred Fifteen and No/100 Dollars ($168,115.00), and directed plaintiff to prepare, serve and file a final judgment and decree herein.

Now, Therefore, pursuant thereto, It Is Ordered, Adjudged and Decreed that plaintiff have judgment

against defendant Jack Daniel Distillery, Lem Motlow Prop., Inc., a corporation, for the recovery of defendant Jack Daniel Distillery, Lem Motlow Prop., Inc., a corporation, of the sum of One Hundred Sixty-Eight Thousand One Hundred Fifteen and No/100 Dollars ($168,115.00) and each party to bear its own costs.

Done in open Court this 24 day of March, 1969.

/s/ George B. Harris
United States District Judge

I certify that a copy of the foregoing Judgment and Decree was served by first class United States mail on counsel for defendant on March 17, 1969.

/s/ J. Albert Hutchinson
J. Albert Hutchinson

Appendix 7

CALIFORNIA BUSINESS AND PROFESSIONS CODE

§ 16720. *Trust.* A trust is a combination of capital, skill or acts by two or more persons for any of the following purposes:

(a) To create or carry out restrictions in trade or commerce.

(b) To limit or reduce the production, or increase the price of merchandise or of any commodity.

(c) To prevent competition in manufacturing, making, transportation, sale or purchase of merchandise, produce or any commodity.

(d) To fix at any standard or figure, whereby its price to the public or consumer shall be in any manner controlled or established, any article or commodity or merchandise, produce or commerce intended for sale, barter, use or consumption in this State.

(e) To make or enter into or execute or carry out any contracts, obligations or agreements of any kind or description, by which they do all or any or any combination of any of the following:

(1) Bind themselves not to sell, dispose of or transport any article or any commodity or any article of trade, use, merchandise, commerce or consumption below a common standard figure, or fixed value.

(2) Agree in any manner to keep the price of such article, commodity or transportation at a fixed or graduated figure.

(3) Establish or settle the price of any article, commodity or transportation between them or themselves and others, so as directly or indirectly to preclude a free and unrestricted competition among themselves, or any purchasers or consumers in the sale or transportation of any such article or commodity.

(4) Agree to pool, combine or directly or indirectly unite any interests that they may have connected with the sale or transportation of any such article or commodity, that its price might in any manner be affected. (Added Stats. 1941, c. 526, p. 1835, § 1.)

§ 16727. *Lease or sale of goods under agreement with lessee or purchaser not to use or deal in competitor's goods.* It shall be unlawful for any person to lease or make a sale or contract for the sale of goods, merchandise, machinery, supplies, commodities for use within the State, or to fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement or understanding that the lessee or purchaser thereof shall not use or deal in the goods, merchandise, machinery, supplies, commodities, or services of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement or understanding may be to substantially lessen competition or tend to create a monopoly in any line of trade or commerce in any section of the State. (Added Stats. 1961, c. 738, p. 1978, § 1.)

§ 16750. *Civil action; venue; damages; attorney fees; costs.* (a) Any person who is injured in his business or property by reason of anything forbidden or de-

clared unlawful by this chapter may sue therefor in any court having jurisdiction in the county where the defendant resides or is found, or any agent resides or is found, or where service may be obtained, without respect to the amount in controversy, and to recover three times the damages sustained by him, and shall be awarded a reasonable attorneys fee together with the costs of suit.

The amendments to this section adopted at the 1959 Regular Session of the Legislature do not apply to any action commenced prior to September 18, 1959.

(b) The State and any of its political subdivisions and public agencies shall be deemed a person within the meaning of this section.

(c) The Attorney General may bring an action on behalf of the State or of any of its political subdivisions or public agencies to recover the damages provided for by this section, or by any comparable provision of federal law, provided that the Attorney General shall notify in writing any political subdivision or public agency of his intention to bring any such action on its behalf, and at any time within 30 days thereafter, such political subdivision or public agency may, by formal resolution of its governing body or as otherwise specifically provided by applicable law, withdraw the authority of the Attorney General to bring the intended action. (Added Stats. 1941, c. 526, p. 1836, § 1, as amended Stats. 1959, c. 2078, p. 4811, § 1; Stats. 1961, c. 1023, p. 2705, § 1.)

§ 16757. *Proof; sufficiency.* (a) In prosecutions under this chapter, it is sufficient to prove that a trust

or combination exists, and that the defendant belonged to it, or acted for or in connection with it, without proving all the members belonging to it, or proving or producing any article of agreement, or any written instrument on which it may have been based, or that it was evidenced by any written instrument at all.

(b) The character of the trust or combination alleged may be established by proof of its general reputation as such. (Added Stats. 1941, c. 526, p. 1838, § 1.)

Appendix 8

TITLE 15, UNITED STATES CODE

§ 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: *Provided,* That nothing contained in sections 1-7 of this title shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trademark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 45 of this title: *Provided further,* That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each others. . . . July 2, 1890, c. 647, § 1, 26 Stat.

209; Aug. 17, 1937, c. 690, Title VIII, 50 Stat. 693; July 7, 1955, c. 281, 69 Stat. 282.

§ 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court. July 2, 1890, c. 647. § 2, 26 Stat. 209; July 7, 1955, c. 281, 69 Stat. 282.

§ 14. It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies, or other commodities, whether patented or unpatented, for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies, or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce. Oct. 15, 1914, c. 323, § 3, 38 Stat. 731.

§ 15. Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. Oct. 15, 1914, c. 323, § 4, 38 Stat. 731.

§ 18. No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.

No corporation shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of one or more corporations engaged in commerce, where in any line of commerce in any section of the country, the effect of such acquisition, of such stocks or assets, or of the use of such stock by the voting or granting of proxies or otherwise, may be substantially to lessen competition, or to tend to create a monopoly.

This section shall not apply to corporations purchasing such stock solely for investment and not using the same by voting or otherwise to bring about, or in attempting to bring about, the substantial lessening of competition. Nor shall anything contained in this section prevent a corporation engaged in commerce from causing the formation of subsidiary corporations for the actual carrying on of their immediate lawful business, or the natural and legitimate branches or extensions thereof, or from owning and holding all or a part of the stock of such subsidiary corporations, when the effect of such formation is not to substantially lessen competition. * * * Oct. 15, 1914, c. 323, § 7, 38 Stat. 731; Dec. 29, 1950, c. 1184, 64 Stat. 1125.

Appendix 9

Since no pretrial conference order eventuated herein, the contract issues submitted to the trial court for resolution must be determined from the pleadings and the opening statements of the parties (RT 1-71). Neither party advanced any issue related to a "reasonable time contract". The relevant portions of Jack Daniel's statement (RT 29:18-32:4) may be summarized as follows:

The contract issue submitted and tried was whether "a Bowman type contract" was to be found, and Jack Daniel specifically conceded and represented to the trial court that it did not advance "a reasonable time contract", but relied upon *"Ace Distributing"* (318 F.2d 283, sixth circuit); (RT 29:18-32:4) and asserted "a will contract", "with the right to terminate *at any time* without cause" as *"outside* the Burgermeister case" (RT 63:15-65:1) "that the case will boil down to . . . what actually occurred in fact . . . not only what the witnesses say they said but *the way they conducted themselves as to what was orally agreed upon and what the parties contemplated"* (RT 66: 6-12), "there was at least *a modification in 1956* . . . under which *it was clearly contemplated by the parties* . . . at that time it was absolutely clear under these changes . . . *that the arrangement was contemplated by the parties to last at least four years* . . ." *"promises were made on behalf of Alpha* . . . for example, to allocate . . . to keep separate records as to the amount . . . some of which they have alleged

here, and so much will appear in the evidence . . . to make allocation records available to Daniel's . . . *to refrain from the purchase of charcoal filtered whiskey during the period of allocation and . . . during the continuation of the contract*" (RT 53:2-54:15).

The latter modification and the latest modification of the contract, expansion of Alpha's exclusive territory, on October 27, 1958, were confirmed in writing.*

*See exhibits 1 and 2 (appended to complaint, admitted by answer) and compare the cases of *Great Western etc. v. John A. Walthen D. Co.*, 10 C. 2d 442, 445-446; 66 P 2d 717; and *Steelduct Co. v. Henger-Seltzer Co.*, 50 C. A. 2d 475, 477; 132 P 2d 100.